

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 156 OF 2017

Shri. Gani Bandu Shikalgar ...Appellant

Versus

Smt. Sakina Babasaheb Shikalgar & Ors ...Respondents

Mr. Gajanan M. Savagave, for the Appellant.

CORAM: N. M. JAMDAR, J

DATED: 4 JANUARY, 2018

Oral Order:-

1. By this Second Appeal the Appellant – original Defendant No.1 has challenged the judgments and orders passed by the learned Civil Judge Senior Division, Jaysingpur dated 26 March 2013 and the learned District Judge, Jaysingpur dated 30 October 2015. The Suit filed by the Respondent – Plaintiff claiming share in the properties was decreed and the Appeal filed by the Appellant was dismissed.

2. The Respondent No.1 – original Plaintiff filed a suit for partition and possession in respect of the suit properties that is, C.S.No.1020, admeasuring area 243 sq. mtrs., Tenure A out of it, ½ share, C.S.No.1936, admeasuring area 124 sq. mtrs., Tenure A and C.S.No.87, admeasuring area 9-60 sq. mtrs.

situated at village Nandani, Tal. Shirol, Dist. Kolhapur. These properties belonged to Bandu Shikalgar, the father of the Appellant. Respondent – Plaintiff is the daughter of Bandu Shikalgar, wife of the other son, who had expired. The Appellant resisted the said suit on the ground that Bandu Shikalgar had executed a Will in respect of the properties on 18 January, 1989 in favour of the Appellant. The learned Civil Judge, Jaysingpur framed issues as to the claim of the Appellant based on the Will. The learned Civil Judge, after considered the evidence on record and the position under Mohammedan Law regarding a valid gift. The learned Judge held that the Will-Exhibit-42 was regarding the entire property of Bandu Shikalgar and it was not permissible for Bandu to gift all the properties to the Appellant unless of all the heirs consented to the same. The learned Civil Judge held that there was no consent of the other heirs. Having held that the Will was not valid, the learned Civil Judge proceeded to grant 2/7th share to Respondent No.1 – Plaintiff in the suit property by the judgment and order dated 26 March, 2013. The learned District Judge confirmed the said conclusion by dismissing the Regular Civil Appeal No.74 of 2013 by judgment and order dated 30 October, 2015.

3. Heard the learned Counsel for the Appellant.
4. As regard the validity of the Will, both the Courts below have rightly relied upon the position of law as enunciated in

Mulla's Principles of Muslim Law (18th Edition) and the decision of this Court in *Damodar Kashinath Rasane vs. Smt. Sahajadibi* reported in *AIR 1989, Bombay 1*. No contrary position of law is shown. Nothing is shown that all the heirs had consented for bequeathing the entire properties in favour of the Appellant alone.

5. The learned Counsel for the Appellant contended that the suit was not maintainable since the husband of Respondent No.1 – original Plaintiff had expired in the year 2007 and there is no concept of a joint family under Mohammedan Law. This argument was also advanced in the Trial Court. It was advanced, coupled with the contention based on the validity of the Will. The learned Civil Judge, after holding that the Will was not valid, negated this contention, holding that the husband of Respondent No.1 – Plaintiff was the son of deceased Bandu Shikalgar and therefore the Plaintiff being his only heir, had a right to claim a 2/7th share. Except reiterating this argument in the Trial Court, no position of law shown that such a suit filed is barred by any provision of Mohammedan Law. There is no dispute that Respondent No.1 is the daughter-in-law of deceased Bandu Shikalkar and her husband was entitled to share in the properties. Once that is established, it cannot be said that the suit was not maintainable.

6. No question of law, much less a substantial question of law arises. The Second Appeal is dismissed.

[N. M. JAMDAR, J.]